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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ILLINOIS HIGH SCHOOL ASSOCIATION,
Petitioner,

v.

GTE VANTAGE INCORPORATED,
Respondent.

Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD W. YOUNG
(Counsel of Record)
DARREN S. CAHR
NICOLE M. SMITH
Gardner, Carton & Douglas
321 N. Clark Street
Suite 3400
Chicago, Illinois 60610
(312) 644-3000
Attorneys for Petitioner Illinois High School Association

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the rubric of a new "dual-use" trademark, a senior trademark owner must share its trademark rights with a third party with whom the public comes to associate the mark.

2. Whether the media's First Amendment protected use of a trademark can divest the trademark owner of its rights and transfer those rights to a third party.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Illinois High School Association states that it is a not-for-profit association, and has neither a parent company nor any non-wholly owned subsidiaries.

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Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Illinois High School Association ("IHSA") seeks a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in *Illinois High School Association v. GTE Vantage Incorporated*, 99 F.3d 244 (7th Cir. 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Posner, C.J.) is reported at 99 F.3d 244, and is reprinted in Appendix A at 1a-7a.[1] The order of the United States Court of Appeals granting a stay of mandate pending the IHSA's petition for writ of certiorari, which is unreported, is reprinted in App. B at 8a-20a.

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[1]The opinions and orders reprinted in the Appendix are referred to as "App." followed by the relevant appendix page designations.

A transcript of the orally rendered judgment of the United States District Court for the Central District of Illinois (Mihm, J.), which is unreported, is reprinted in App. C at 9a-20a.

The order of the United States District Court for the Central District of Illinois (Mihm, J.) denying the IHSA's Motion for Reconsideration, which is unreported, is reprinted in App. D at 21a-22a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision on October 30, 1996. The Seventh Circuit granted Petitioner's Motion to Stay Issuance of Mandate Pending Application for Certiorari and stayed issuance of the mandate until December 20, 1996. This Petition for Writ of Certiorari is being timely filed. The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the United States District Court for the Central District of Illinois was invoked under 15 U.S.C. § 1121 and 28 U.S.C. § 1338 and principles of ancillary and pendant jurisdiction.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Trademark Act of 1946 (the "Lanham Act"), as amended, 15 U.S.C. § 1125(a)(1), provides as follows:

> (a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which—
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,

> connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person
>
> * * *
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The First Amendment of The Constitution of the United States, U.S. Const. Amend. I, provides as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

At issue in this case is the right of the IHSA to enjoin Respondent GTE Vantage Incorporated ("GTE") from infringing the IHSA's trademark MARCH MADNESS. This action originated in the United States District Court for the Central District of Illinois, where the IHSA sought to enjoin GTE from infringing the IHSA's MARCH MADNESS trademark under a purported license from the National Collegiate Athletic Association ("NCAA"). The District Court recognized the IHSA's senior rights in the mark, but denied the IHSA's preliminary injunction motion on the grounds that the media's non-commercial use of the phrase "March Madness" in connection with the NCAA's Final Four basketball tournament had diminished the IHSA's rights and resulted in common law trademark rights for the NCAA.

The Seventh Circuit affirmed the denial of the IHSA's preliminary injunction motion on the grounds that media use of the term "March Madness" had resulted in public association of

the term with the NCAA's Final Four tournament. The Seventh Circuit held that this public association created unspecified rights to the MARCH MADNESS mark in the NCAA, and consequently deprived the IHSA of some of its pre-existing rights to the mark. In so doing, the Seventh Circuit awarded the NCAA co-ownership in the IHSA's mark, and denominated an entirely new form of trademark, which it called the "dual-use" trademark.

A. *Factual Background*

The District Court and the Seventh Circuit both recognized the IHSA's senior rights to the MARCH MADNESS mark, noting that the IHSA has used MARCH MADNESS to identify its annual basketball tournament and goods and services related to interscholastic basketball since at least the 1940s. (App. A at 1a; App. C at 11a). The IHSA's mark has been broadcast nationally in association with its services (App. A at 1a; App. C at 15a), and its licensees have used the mark on a variety of products. (App. A at 1a, 2a; App. C at 11a).[2]

The IHSA brought suit against GTE to enjoin its recent use of the MARCH MADNESS mark to promote a CD-ROM basketball video game. In its defense, GTE asserted that it had obtained a valid license to the mark from the NCAA. In contrast to the IHSA's history of use, however, the NCAA had never itself used the mark. Rather, CBS sportscaster Brent Musberger, who first became aware of the term "March Madness" while covering the IHSA tournament in the late 1960s and the early 1970s, began using the term "March Madness" in his own broadcasts to describe the NCAA's basketball tournament in the early 1980s. (App. A at 2a; App. C at 11a). It was not until 1993 or 1994 that the NCAA began attempting to license use of the mark. (App. A

[2] The IHSA's licensed uses include, *inter alia*, the use of the mark in national PepsiCo point-of-purchase displays, on Pepsi soft drink cans themselves, on Wilson basketballs, and on the Chicago Tribune's World Wide Web site. (App. E at 23a-26a).

at 2a; App. C at 13a). Before that time, there existed no MARCH MADNESS branded goods or services associated with the NCAA's Final Four Tournament. When GTE began promoting its video game in 1996 under the MARCH MADNESS mark, and refused to comply with the IHSA's demands to desist, the IHSA sought injunctive relief.

B. *The District Court Proceedings*

The IHSA argued before the District Court that GTE's use of the MARCH MADNESS mark to promote its basketball video game caused a likelihood of reverse confusion because any basketball video game marketed by the IHSA would likely be viewed by the public as connected with, or sponsored by, the NCAA. Based on the undisputed facts, the District Court found that the IHSA had developed a common law trademark and that "originally it [the IHSA's MARCH MADNESS mark] was very strong." (App. C at 15a). However, the District Court held that the IHSA's rights had been diminished by the media's use of the mark in connection with the NCAA's Final Four tournament. The District Court further held that, solely as a result of such media use, the NCAA "had established a common law mark regarding the use of [MARCH MADNESS] in connection with the NCAA tournament." (App. C at 13a).

The IHSA moved the District Court to reconsider its decision, arguing that: (1) the media's non-commercial use could not diminish the IHSA's rights to its mark and bestow rights on the NCAA; and (2) the court failed to apply the doctrine of reverse confusion. The District Court denied the IHSA's motion, and the IHSA appealed.

C. *The Seventh Circuit's Decision*

On appeal to the Seventh Circuit, the IHSA again argued that protected media use could not transfer trademark rights, and that public association was not relevant to mark ownership where

the mark was previously used and owned by another. The Seventh Circuit held that public association of MARCH MADNESS with the NCAA's Final Four tournament through media use created trademark rights in the NCAA and deprived the IHSA of pre-existing rights obtained through first use, despite the fact that the NCAA itself had never used the mark. Contrary to the accepted function and understanding of trademarks as designating one source, the Seventh Circuit held that MARCH MADNESS could designate *more than one* source for the same and related goods and services, sold in the same geographic region, through the same channels of trade. The Seventh Circuit called this new form of trademark a "dual-use" trademark.

The Seventh Circuit also held that a mark owner cannot recover for reverse confusion unless the defendant is culpable, and that, even if the defendant is culpable, he cannot be enjoined if the infringement has resulted in greater public association with him than with the mark's rightful owner. (App. A at 4a). The Seventh Circuit then affirmed the denial of the IHSA's motion for a preliminary injunction, and remanded the case to the District Court for entry of judgment in favor of GTE.

The IHSA filed a motion to stay the Seventh Circuit's mandate, arguing that the Seventh Circuit's decision warrants Supreme Court review because it undermines the accepted function and understanding of trademarks as a designation of a single source—a designation upon which the consuming public and trademark owners rely. By awarding the NCAA trademark rights based on the media's protected, non-commercial use, the Seventh Circuit's decision also upsets the balance between the protection afforded trademarks and the protection afforded non-commercial speech under the First Amendment because it transforms the media into an arbiter of trademark rights and compels mark owners to challenge the media's descriptive uses of trademarks. As a result, argued the IHSA, the Seventh Circuit's decision will impair the ability of trademark owners to control their marks and

will lead to consumer confusion. The Seventh Circuit granted the IHSA's motion to stay its mandate, and stayed issuance of its mandate until December 20, 1996, pending the filing of the IHSA's Petition for Writ of Certiorari and final disposition by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S CREATION OF A NEW "DUAL-USE" TRADEMARK, UNDER WHICH A SENIOR TRADEMARK OWNER MUST SHARE ITS TRADEMARK RIGHTS WITH A THIRD PARTY WITH WHOM THE PUBLIC COMES TO ASSOCIATE THE MARK, UNDERMINES THE LONG ACCEPTED FUNCTION AND UNDERSTANDING OF TRADEMARKS.

Before the Seventh Circuit issued its decision, trademarks and service marks were universally understood as designations of unitary source, origin, sponsorship or association. 15 U.S.C. § 1125(a)(1); 15 U.S.C. § 1127. *See also United States v. Steffens*, 100 U.S. (10 Otto) 82, 90 (1879); *Qualitex Company v. Jacobsen Products Company, Inc.*, __ U.S. __, 115 S.Ct. 1300, 1303 (1995). Trademarks serve to protect both consumers and trademark owners. Trademarks protect consumers by assuring them of a single source, and hence equal quality, for all related goods sold under the same mark. *Qualitex*, 115 S.Ct. at 1303. Trademarks protect mark owners by assuring them of identification in the marketplace, and creating a repository for the good will of their products and services in the public mind. *Id.*

For well over one hundred years, this Court has recognized that trademark rights are established through prior use in commerce. *Steffens*, 100 U.S. at 92. *See also United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97, 100 (1918) ("the right to a particular mark grows out of its use, not its mere adoption.... [A]s between conflicting claimants to the right to

use the same mark, priority of appropriation determines the question"). Once a trademark is established, the trademark owner has rights superior to all junior users of the mark. *Id.*

The Seventh Circuit's decision, however, eviscerates this long-established rule of law by holding that public association of a mark with someone other than the mark owner creates new "dual-use" rights to the mark. This departure from the rule of first use undermines the fundamental function of trademarks as an indication of origin. Under the Seventh Circuit's decision, trademarks may now identify *more than one* source for the same and related goods and services, sold in the same geographic region, through the same channels of trade. This decision impairs the ability of trademark owners to enforce and police their marks, and will confuse consumers, who will be unable to distinguish multiple sources or sponsors of similar goods and services sold under the same mark.

No court has ever held that public association may divest a senior mark owner of its rights, and concomitantly transfer those rights to a third party who has never itself used the mark.[3] Yet the Seventh Circuit's decision does just that. Under the Seventh Circuit's novel construction of trademark law, mark holders must share their trademarks with third parties who are pernicious enough, or lucky enough, to obtain public association with the mark.

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[3] A handful of cases have held that public association can establish rights *in the absence* of a prior user of the mark. *American Stock Exchange, Inc. v. American Express Co.*, 207 USPQ 356 (TTAB 1980) (use of AMEX by public and American Express itself preceded any use of AMEX by American Stock Exchange); *National Cable Television Awards Association, Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572 (Fed. Cir. 1991) (use of ACE AWARDS by public and American Cinema Editors itself occurred *long before* the National Cable Television Association introduced its "ACE" awards for cable broadcasting); *Coca-Cola Company v. Busch*, 44 F. Supp. 405 (E.D. Pa. 1942) (no prior users of the mark "Coke" existed before the public and the media began to use the mark to refer to Coca-Cola); *Pieper v. Playboy Enterprises, Inc.*, 179 USPQ 318 (TTAB 1973) (no prior users of the mark "BUNNY CLUB" existed prior to the public association of "bunnies" with Playboy Enterprises).

"Dual-use" trademarks, if allowed to exist, will cloud the rights and obligations of mark owners. Trademark owners not only have the right to prevent confusion with their goods and services by stopping unauthorized uses of their marks, they have a duty to ensure that their marks continue to serve as source identifiers by challenging, including through litigation, unauthorized commercial uses of their marks. 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 11.28 at 11-152 (3d ed. 1995). The "dual-use" rights created by the Seventh Circuit, however, impair the ability of mark owners to enforce and police their marks because it is unclear which of the "dual-use" trademark holders will have the right, or the obligation, to halt other parties from unauthorized uses of the mark. Each mark holder's exercise of its "dual-use" rights and obligations, or the failure to do so, may affect the trademark rights of the other. For example, the failure of one "dual-use" trademark owner to enforce the mark against uses by third parties may undermine the trademark rights of the other owner.

The untenable position in which the Seventh Circuit has placed trademark owners becomes even more acute in cases where, as here, the mark is licensed for use by third parties. For example, the IHSA licenses the MARCH MADNESS mark for use on basketballs.[4] There is no reference on the basketballs to either the IHSA tournament or the NCAA tournament. The Seventh Circuit's decision presents the possibility that an NCAA licensee may also use the mark on basketballs, but does not clarify who has the right, or the duty, to halt third parties from making such a use. This form of trademark joint tenancy created by the Seventh Circuit destroys the sourcing function of trademarks and will confuse consumers.

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[4] *See* n. 2, *supra*.

II. PERMITTING THE MEDIA'S FIRST AMENDMENT PROTECTED USE OF A TRADEMARK TO DIVEST THE TRADEMARK OWNER OF ITS RIGHTS AND TRANSFER THOSE RIGHTS TO A THIRD PARTY UPSETS THE BALANCE BETWEEN TRADEMARK PROTECTION AND THE FIRST AMENDMENT.

The District Court and the Seventh Circuit both recognized the IHSA's senior rights to the mark MARCH MADNESS. (App. A at 1a; App. C at 11a). However, both courts held that the media's independent, non-commercial use of the term "March Madness" to refer to the NCAA's Final Four basketball tournament (even in the absence of any use by the NCAA itself) created rights to the mark in the NCAA. The Seventh Circuit explained that where the public is using a mark holder's name with someone else's good or service, ownership of the mark "should be resolved against trademark protection . . . for the sake of protecting effective communication." (App. A at 6a).

The Seventh Circuit's decision, however, will erode, not protect, effective communication. Mark owners will be hamstrung in their ability to communicate their identity to the public without confusion, while the public will no longer be assured that trademarks designate a single source. Furthermore, to avoid the risk of losing rights in their marks, trademark owners will be compelled to challenge, whether by economic influence, threat of suit, or otherwise, the media's non-commercial, descriptive and fair uses of trademarks. The Seventh Circuit's decision upsets the balance between the protection afforded trademarks and the protection afforded non-commercial speech because it compels mark owners to challenge the media in order to prevent a transfer of their trademark rights.

The Seventh Circuit explained its conception of the interplay between the media and trademark owners through its interpretation of *Lucasfilm Ltd. v. High Frontier,* 622 F. Supp. 931 (D.D.C. 1985). The mark at issue in *Lucasfilm,* "STAR

WARS," had, "[t]hrough persistent and prolific use in newspapers and magazines and over television and radio . . . become a popular synonym for the SDI [the Reagan Administration's Strategic Defense Initiative] proposal." *Lucasfilm,* 622 F. Supp. at 933. The plaintiff in *Lucasfilm* sought to enjoin several public interest media groups from using the phrase "star wars" to refer to SDI in broadcast television messages. The *Lucasfilm* court recognized that "[o]verlying this lawsuit is plaintiff's natural concern that if he does not seek legal remedies to protect his mark he will lose it," but ruled that the plaintiff could not enjoin these non-commercial uses of its mark because "the use of star wars in . . . newspapers or noncommercial, non-trade references will not undermine plaintiff's exclusive property right to use it in connection with goods and services." *Id.* at 935. The court further stated that, even though the plaintiff could not enjoin the public interest media groups' noncommercial uses of its mark:

> it would be equally unrealistic and unfair to take from the lawful owner of a strong trademark his continued right to its commercial use because others, beyond his control . . . used the words of the trademark as part of an on-going international political debate.

Id.

The Seventh Circuit, however, reached a different conclusion, stating that the plaintiff in *Lucasfilm* would also be powerless to stop any *commercial* uses of the mark by government licensees that sold STAR WARS brand missiles because, as a result of the non-commercial use by public interest groups, "[t]he name would have become attached by the public to another product as well as to the movies, just as happened here." (App. A. at 7a). If allowed to stand, the Seventh Circuit's decision would compel mark owners to do everything in their power to halt all non-commercial uses of their marks. This increased surveillance required by the Seventh Circuit's decision will then have a chilling effect on the media's protected speech.

The Seventh Circuit's decision fails to recognize the distinction between commercial and non-commercial speech, and consequently clouds the rights and obligations of trademark owners. Traditionally, trademark owners have had nothing to fear from communicative, non-commercial uses of their marks. *Lucasfilm*, 622 F. Supp. at 933-935. *See also* 4 *McCarthy on Trademarks* § 31.37[7][d] at 31-211, interpreting *Lucasfilm*. Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view:

> [T]he First Amendment confers a measure of protection for the unauthorized use of trademarks when that use is a part of the expression of a communicative message.... Free speech rights do not extend to labeling or advertising products in a manner that conflicts with the trademark rights of others.... *However, when unauthorized use of another's mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right.*

Yankee Publishing Inc. v. News America Publishing, Inc., 809 F. Supp. 267, 275-6 (S.D.N.Y. 1992) (emphasis added). *See also L.L. Bean v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987), *cert. denied*, 483 U.S. 1013 (1987) (non-commercial parody of L.L. Bean trademark by adult magazine protected by First Amendment); *Girls Scouts v. Bantam Doubleday Dell Publishing Group, Inc.*, 808 F. Supp. 1112, 1118 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 1477 (2d Cir. 1993) ("The owner of a trademark does not possess a property right that is superior to the First Amendment right accorded to artistic expression"); *International Association of Machinists and Aerospace Workers v. Winship Green Nursing Center*, 914 F. Supp. 651, 654 (D.Maine 1996) (employer's unauthorized use of union's service mark in letters to employees opposing

union's organization efforts was not commercial use of mark in connection with any goods or services and thus was not trademark infringement).[5]

The Seventh Circuit's decision, however, not only limits the protections afforded trademarks, it threatens the protections provided by the First Amendment. The media had a right, privileged by the First Amendment, to use the term "March Madness" in a non-commercial manner. If the Seventh Circuit's decision is not overturned, trademark owners will be unable to control their marks and will be forced to besiege the media.

CONCLUSION

The Seventh Circuit's decision turns trademark law on its head and creates an unworkable model of trademark protection for both the consuming public and mark owners. Displacing the rule of first use for establishing trademark rights with a test of public association creates perverse incentives for trademark infringers to create as much confusion as possible in the marketplace so as to achieve public association and thus gain ownership rights in another's mark. Establishing "dual-use" trademark rights to the same mark, used for the same and related goods and services, sold in the same geographic region, through the same channels of trade, impairs both the right and the obligation of mark owners to control their marks. Establishing trademark rights based on the media's non-commercial use will force mark holders into the untenable position of hounding the media in order to prevent their rights from being transferred to another party. Trademark rights will not be secure, and the public will be confused.

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[5] The First Amendment's protection of communicative works and media commentary is also apparent in the doctrine of "fair use," which is codified as part of the Lanham Act, and which freely permits descriptive, non-commercial use of trademarks. 15 U.S.C. § 1115(b); 15 U.S.C. § 1125(c)(4).

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Attorneys for Petitioners
ILLINOIS HIGH SCHOOL
ASSOCIATION

RICHARD W. YOUNG
(Counsel of Record)
DARREN S. CAHR
NICOLE M. SMITH
Gardner, Carton & Douglas
321 N. Clark Street, Suite 3400
Chicago, Illinois 60610
(312) 644-3000

December 20, 1996

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1981

ILLINOIS HIGH SCHOOL ASSOCIATION,
Plaintiff-Appellant,

v.

GTE VANTAGE INC.,
Defendant-Appellee.

APPEAL from the United States District Court for the Central District of Illinois, Peoria Division.

No. 96 C 1119
MICHAEL M. MIHM, *Chief Judge.*

Argued September 24, 1996
Decided October 30, 1996

Before POSNER, *Chief Judge,* and HARLINGTON WOOD, Jr., and ESCHBACH, *Circuit Judges.*

POSNER, *Chief Judge.* This is an appeal from the denial of a preliminary injunction sought by the Illinois High School Association to protect its trademark "March Madness" against infringement by GTE Vantage Inc. Vantage holds a license for the mark from the National Collegiate Athletic Association. The appeal presents a novel issue of trademark law.

Since the early 1940s, the Illinois High School Association, sponsor of the Illinois high school basketball tournament—the premiere high school basketball tournament in the United States, we are told—has used the trademark "March Madness" to designate the tournament, held every year in March and sometimes broadcast nationally. IHSA has licensed the use of the

trademark on merchandise associated with the tournament. Another basketball tournament—NCAA's "Final Four" championship—is also played in March, spilling over into the early part of April. In 1982, when CBS began televising the "Final Four" championship games, broadcaster Brent Musburger used the term "March Madness" to designate them. The term caught on and is now widely used by the media and the public to denote this basketball tournament as well as IHSA's.

In 1993 or 1994, NCAA began licensing the use of the term "March Madness" to producers of goods and services related to its tournament. Earlier this year one of the licensees, Vantage, began using "March Madness" to promote a CD-ROM game that it calls "NCAA Championship Basketball." The term "March Madness" appears in a circle on the box in which the game is to be sold and in some of the game's computer graphics. Vantage's use of the term precipitated this suit, which seeks injunctive relief for unfair competition under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

IHSA argues that the use by NCAA licensees of the term "March Madness" is likely to confuse consumers. A few will think that Vantage's game is sponsored by IHSA or otherwise connected with the Illinois high school basketball tournament, but more will think that the IHSA tournament is sponsored by NCAA or that the trademark "March Madness" affixed to merchandise licensed by IHSA actually refers to the NCAA tournament. The latter effect—what the cases call "reverse confusion," where a powerful junior user of the trademark (NCAA dwarfs IHSA) swamps the senior's use of it with advertising and other publicity that extinguishes consumer demand for the senior user's product, *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 957-58 (7th Cir. 1992); *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 740-41 (2d Cir. 1994); 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23.01[5]

(3d ed. 1995)—is likely to impair IHSA's ability to make money by licensing its trademark on merchandise and other incidentals.

The issue of likelihood of confusion does not arise, however, until it is determined that the plaintiff has a trademark that the law will protect; and the district judge thought that IHSA does not, so far as the use of the term "March Madness" in connection with the NCAA tournament is concerned. It has been many years since the media first appropriated the term to describe the NCAA tournament (if "appropriation" is the right word—it may be a case of independent discovery). Most people know what they know about college basketball from the media. If the media call the NCAA tournament "March Madness," that is what the public will call it, or know it as.

IHSA argues that it is unfair to make its rights depend on the whims of the media. Because a court could not, without violating the free-speech clause of the First Amendment, have enjoined (or used other legal remedies to prevent or deter) the media from calling the NCAA tournament "March Madness," IHSA was helpless to prevent its trademark from being transformed into the name of another product. Its property right should not, it argues, depend on events over which it has no control.

It is true that IHSA could not have sued Musburger or CBS for referring to "March Madness" in a news program (including a program of sports news), see *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987), or even in advertising if the term were used merely for identification. *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992). But it could have sued them (with what success we need not speculate—a suit at this late date would surely be barred by laches) for using its trademark to promote CBS's broadcast of the NCAA championship. And it could have supplicated them not to spoil its trademark by using it to name something else. A serious trademark holder is assiduous in

endeavoring to convince dictionary editors, magazine and newspaper editors, journalists and columnists, judges, and other lexicographically influential persons to avoid using his trademark to denote anything other than the trademarked good or service. These efforts sometimes succeed. IHSA was not assiduous. But that is a detail—is in fact irrelevant, for no defense of laches has been pleaded by Vantage or, so far as the record suggests, would succeed.

What matters is that a trademark is not nearly so secure an entitlement as a property right. See *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) (Holmes, J.); *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 173 (7th Cir. 1996); *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 45 (1st Cir. 1991). It is mainly just a designation of source, 15 U.S.C. §§ 1114(1), 1125(a), and dies when it ceases to designate, for whatever reason other than the culpable conduct of the defendant. See, e.g., *Sands, Taylor & Wood Co. v. Quaker Oats Co., supra*, 978 F.2d at 960. Were NCAA responsible for blotting out the exclusive association of "March Madness" with the Illinois high school basketball tournament, IHSA might have a remedy on a theory of reverse confusion, though probably not an injunctive remedy since that would promote confusion among consumers, most of whom now identify the term with the NCAA tournament. But IHSA blames CBS, which is not a defendant, rather than NCAA, much less Vantage, for the blotting out.

Even antidilution statutes—and there is now an anti-dilution provision in federal trademark law for "famous" marks, 15 U.S.C. § 1125(c), which however "March Madness" is not claimed to be—do not elevate a trademark all the way to property. They do protect the trademark owner from the erosion of the distinctiveness and prestige of a trademark caused by the sale of other goods or services under the same name (for example, the use of "Tiffany & Co." as the name of a hamburger stand, or simply a proliferation of borrowings that, while not degrading the original

seller's mark, are so numerous as to deprive the mark of its distinctiveness and hence impact), even though there is no confusion of source. E.g., *Sunmark, Inc. v. Ocean Spray Cranberries, Inc.*, 64 F.3d 1055, 1060 (7th Cir. 1995); *Fruit of the Loom, Inc. v. Girouard*, 994 F.2d 1359, 1363 (9th Cir. 1993); see also 3 McCarthy, *supra*, § 24.13[1]. But the existence of a mark that designates a particular source is presupposed. When a trademark become generic, such as "Aspirin" or "Thermos," and so loses trademark protection, because the public, perhaps egged on by the omnipresent media, decides to use the trademark to designate not the particular manufacturer's brand but the entire product comprising all the competing brands, the trademark is dead no matter how vigorously the holder has tried to prevent this usage. *W.T. Rogers Co. v. Keene*, 778 F.2d 334, 347 (7th Cir. 1985); *King-Seeley Thermos Co. v. Alladin Industries, Inc.*, 321 F.2d 577, 579 (2d Cir. 1963); *DuPont Cellophane Co. v. Waxed Products Co.*, 85 F.2d 75, 81-82 (2d Cir. 1936); *Bayer Co. v. United Drug Co.*, 272 Fed. 505, 509 (S.D.N.Y. 1921) (L. Hand, J.); 2 McCarthy, *supra*, § 12.08. An antidilution statute won't resurrect it, since if a mark becomes generic it is no longer distinctive, as the statutes require. 15 U.S.C. § 1125(c)(1); *McGraw-Edison Co. v. Walt Disney Productions*, 787 F.2d 1163, 1174 (7th Cir. 1986); *Hyatt Corp. v. Hyatt Legal Services*, 736 F.2d 1153, 1157 (7th Cir. 1984).

IHSA acknowledges this point but seeks to deflect it by pointing out that "March Madness" has not become generic. It is not the name of basketball tournaments, or any other set of events, that occur in March. It is the name of two basketball tournaments, IHSA's and the NCAA's. (It has also been used to promote special discount sales of cars, Jennifer Cobb, "March Madness Not Confined to Hoops," *Tulsa World*, March 22, 1995, p. 2, but these uses are too remote to bear significantly on this case.) We cannot see what difference that makes. There is no magic in labels. Let "March Madness" be called not a

quasi-generic term, or a term on its way to becoming generic, but a dual-use term. Whatever you call it, it's a name that the public has affixed to something other than, as well as, the Illinois high school basketball tournament. A trademark owner is not allowed to withdraw from the public domain a name that the public is using to denote someone else's good or service, leaving that someone and his customers speechless. No case so holds, other than the cases involving generic names, but no case holds the contrary, either. It is an issue of first impression, and we think that for the sake of protecting effective communication it should be resolved against trademark protection, thus assimilating dual-use or multiple-use terms to generic terms.

IHSA relies heavily on *Lucasfilm Ltd. v. High Frontier,* 622 F. Supp. 931 (D.D.C. 1985). District court decisions have little weight as precedents, *Anderson v. Romero,* 72 F.3d 518, 525 (7th Cir. 1995); *Mueller v. Reich,* 54 F.3d 438, 441 (7th Cir. 1995)—dicta in those decisions even less—and anyway *Lucasfilm* is not on point. The producer of the movie trilogy "Star Wars" tried unsuccessfully to prevent public interest groups from using in their advertisements opposing President Reagan's Strategic Defense Initiative (an anti-missile program) the term "star wars" to denote the SDI. In the course of rejecting the producer's claim, the court remarked that the use of the term "Star Wars" to denote the SDI would not prevent the producer from using the term "in connection with goods and services." 622 F. Supp. at 935. All that this can sensibly mean is not that Lucasfilm retained the *exclusive* right to use the term in connection with *any* and all goods and services, an issue not remotely before the court, but that it remained free to use its trademark "Star Wars" to designate the movies and the merchandise associated with them. If someone bought rights to the SDI from the U.S. government and sold the anti-missile program to another country under the name "Star Wars," nothing in the *Lucasfilm* opinion or in the principles of trademark law would entitle Lucasfilm to enjoin that

use of the name. The name would have become attached by the public to another product as well as to the movies, just as happened here.

Not only was the preliminary injunction sought by IHSA rightly denied, but since the suit appears to lack any merit, the district court on remand should enter judgment for the defendant, *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 494-95 (1900); *Pratte v. NLRB*, 683 F.2d 1038, 1044 (7th Cir. 1982); *Berry v. Bean*, 796 F.2d 713, 719 (4th Cir. 1986), unless, as we greatly doubt, IHSA is able to find another arrow in its quiver. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2950, p. 245 (2d ed. 1995).

We do not opine on the scope of the trademark rights that either IHSA or NCAA has, beyond ruling that IHSA's rights do not extend to the NCAA tournament and to merchandise such as Vantage's game that is sold in connection with that tournament.

AFFIRMED WITH REMAND.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 19, 1996

Before

Hon. RICHARD A. POSNER, *Chief Judge*

ILLINOIS HIGH SCHOOL ASSOCIATION, an Illinois not for profit organization *Plaintiff-Appellant,* No. 96-1981 vs. GTE VANTAGE INCORPORATED, *Defendant-Appellee.*	Appeal from the United States District Court for the Central District of Illinois, Peoria Division. No. 96 C 1119 Michael M. Mihm, *Chief Judge.*

Upon consideration of **"PLAINTIFF-APPELLANT'S MOTION TO STAY ISSUANCE OF MANDATE PENDING APPLICATION FOR CERTIORARI,"** filed on November 18, 1996, by counsel,

IT IS ORDERED that the motion is **GRANTED** and the mandate is **STAYED** to and including December 20, 1996, pending the filing of a petition for a Writ of Certiorari. If a petition is filed within this time period, the mandate will continue **STAYED** pending completion of proceedings in the Supreme Court. If a petition is not filed within that time period, the clerk will issue the mandate forthwith. Counsel is reminded of their obligation to comply with Circuit Rule 41(e).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

ILLINOIS HIGH SCHOOL ASSOCIATION, an Illinois not-for-profit association,

Plaintiff.

vs.

GTE VANTAGE INCORPORATED, a Delaware Corporation,

Defendant.

Civil No. 96-1119
Peoria, Illinois
March 20, 1996

COURT'S RULING ON MOTION FOR PRELIMINARY INJUNCTION

BEFORE:

HONORABLE MICHAEL M. MIHM
Chief United States District Judge

APPEARANCES:

RICHARD W. YOUNG, ESQ.
DARREN S. CAHR, ESQ.
NICOLE M. SMITH
Gardner, Carton & Douglas
321 N. Clark Street, Suite 3400
Chicago, Illinois 60610
—and—
STEPHEN A. KOURI, ESQ.
Vonachen, Lawless, Trager & Slevin
456 Fulton Street, Suite 425
Peoria, Illinois 61602
(Appeared on Behalf of the Plaintiff)

GERALD M. KRAI, ESQ.
MICHAEL ELBEIN, ESQ.
Litman, McMahon & Brown
1600 One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
—and—
JEFFREY RYVA, ESQ.
Husch & Eppenberger
101 SW Adams, Suite 800
Peoria, Illinois 61602
(Appeared on Behalf of the Defendant)

KAREN S. HANNA, C.S.R.
U.S. District Court Reporter
Central District of Illinois

Proceedings recorded by mechanical stenography, transcript produced by computer

THE COURT: I apologize for keeping you waiting. It took me that long to work through this. I want to thank you at the beginning for the quality of your presentations here this afternoon. It was very helpful to me.

The record that I have before me reflects that beginning in the 1930's or 1940's, this term March Madness was coined by and used by someone and used to describe the IHSA basketball tournament which took place, and still does, in March. From then until the early 1980's, from what I can determine, this term March Madness was only used to describe the Illinois State High School tournament plus 10 or 11 other state basketball tournaments where the use of that term occurred with the permission of the IHSA.

The IHSA merchandised products. They have been shown to us in court today: Cups, T-shirts, pins, books, videos. These were merchandised mostly at the tournament site, which until this year was in Champaign, and by mail order. And I believe that there is a reasonable inference that most, if not all, of the people who ordered some of these items by mail were somehow connected to the Illinois tournament, either because they had a relative playing in it or whatever.

There doesn't appear to be any dispute that this basketball tournament was one of the premier, and still is, one of the premier basketball tournaments in the country at the high school level.

In the early 1980's, Brent Musburger, who was a sportscaster, sports reporter, I believe for CBS at that time, was in Chicago and there seems to be agreement that he is the one who first used the term to refer to the NCAA tournament. And the rest, as they say, is history.

The news media picked up on this, sportscasters all over the country picked up on it, and of course it was national because the NCAA tournament involves college teams from all over the country. Sports fans latched onto it.

So in this period of time, beginning in 1981 to the late eighties and early nineties, we had this NCAA March Madness clearly being identified with the NCAA tournament, and it grew to the point where I think there is even an argument to be made that it's almost part of the public consciousness at this point, at least in terms of any sports fan.

While this was developing in the 1980's, the IHSA, although obviously aware of the use of this term March Madness, did nothing to stop it. That had the effect inevitably of, in my view, as this term NCAA March Madness, referring to the tournament, college tournament, as that grew, I think that had the effect of diluting the mark that the IHSA had.

Now the IHSA says that they took no enforcement action because they considered this to have been fair use. And I think that's a little bit of a stretch quite frankly. The Sands, Taylor case that the plaintiffs rely on is very helpful in this case.

978 Fed. 2d at page 951, it says: "The fair use doctrine is based on the principle that no one should be able to appropriate descriptive language through trademark registration. To prevail on the fair use defense, the defendant must establish that its use of a registered term or device is otherwise than as a trade or a service mark, that the term or device is descriptive of the defendant's goods or services."

I'm not at all sure that I can go that far here without—without being facetious. I really wasn't actually being facetious earlier when I made those comments when I talked about who was actually mad. One might certainly argue that people get excited about this tournament as it unfolds, but this is a term of art that we're dealing with here in the trademark area. I'm not at all sure that we can appropriately characterize what happened when the NCAA used this term March Madness as being descriptive of the defendant's goods and services.

Then the last element is that the defendant is using the term or device fairly and in good faith only to describe to users those goods and services. That's equally, I think, an impossible stretch in this case. My guess is, after listening to the testimony here this afternoon, that if the witness who testified here today had been on board back in the 1980's, that this would not—either would not have occurred or it would have occurred under more controlled circumstances in the sense that the present director is obviously very aggressive in terms of asserting and expanding the rights and prerogatives of the IHSA, which is fine. But that isn't what happened in the 1980's.

So until the late eighties, we have the IHSA using this term March Madness to describe a state high school basketball tournament and beginning in the early eighties and continuing continuously after that we have this term applied commonly to describe the NCAA college tournament.

The indications are that the NCAA made no attempt to license the use of that term until very recently and it also appears that the IHSA, other than giving a token approval to some other states for the use of this, really made no attempt to license this phrase, the use of the phrase, or to give approval to anything other than the use of this in relation to a state basketball tournament until the 1990's. There is one exception and that occurred in 1989 in the incident regarding Intersport.

So it's my view that by the time the IHSA came to the decision that it was appropriate for them, both in a legal sense and in a business sense, to expand this mark, the meaning of it, to include something other than just state high school basketball tournaments, by that time I don't believe they were any longer free to do that because the NCAA, I believe, by that time had established a common law mark regarding the use of this term in connection with the NCAA tournament that had been in continuous use for several years. Normally when we talk about a

trademark, we're talking about the trademark in relation to a product or a service. In this case we're talking about an event.

If we look at the seven factors that we referred to earlier, there are some findings I want to make regarding those.

First of all, item number one is similarity between the marks in appearance and suggestion. Insofar as the term March Madness itself, they are virtually identical. Insofar as the IHSA products are identified as IHSA products, clearly high school related products, and the NCAA products are identified as NCAA products—for example, the specific item before me here being the CD-ROM that has NCAA prominently displayed all over it—in that sense, they are dissimilar. So in appearance, they're in some ways similar and in other ways dissimilar.

In terms of suggestion, they are similar in the sense that they both deal with basketball. They are dissimilar in that one has to do with high school basketball tournaments, the other has to do with the college basketball tournament.

This is not just a difference between high school and college basketball. It's a difference between the college tournament—I guess there may be—is the NIT still around—certainly the one that's most known by the public and, on the other hand, the state high school basketball tournament.

The second point concerning similarity of products, we're comparing here the CD-ROM, which as I understand it is an interactive NCAA tournament video game, with the products which have been produced to this point by the IHSA, that is cups, pins, VCR tapes regarding past tournaments and some of the players and some attempts to make a deal with Sega regarding an interactive video and with another company for a board game which have not succeeded.

These are similar in that they all involve basketball. They are dissimilar in that each of them, at least in anything I have seen

here, clearly identify one as being high school and the other as being college. If they had succeeded with Sega, then they—of course the interactive videos would both have involved basketball.

Number three: The area and manner of concurrent use. Most of the evidence in this case, I think, establishes that until recently most of the use by the IHSA was at the regional level. I won't say just state level, but the regional level. There certainly are exceptions to that. Apparently at one time WGN carried the tournament. Some of the people who actually bought products through these mail order arrangements may have been located at different places around the country. But I think most of it, the real focus of it was at the state level or, at most, regional. The NCAA area covered has always been national in scope. In terms of the manner, both promote basketball tournaments and in both situations the products are related to basketball.

As to the fourth item, the degree of care likely to be exercised by consumers, there are two answers to that. In one sense, I would expect there would be virtually no care exercised by consumers. It's not the kind of thing that I would guess that consumers would spend any nanosecond of time pondering when they go to purchase one of these items.

Having said that, I think again I have to say this. Except if a consumer went into a store looking for a college tournament video, something having to do with college basketball, a video game—let's hold it to a video game since that's what we're talking about here—I don't think that person would be likely to purchase an interactive video that dealt with a high school tournament. I'm just not convinced that would happen. Or vice versa.

Number five: The strength of the complainant's mark. I think originally it was very strong. I think that over time, and the focus being in the eighties when the use of this term NCAA March Madness, when that started catching on, I think it became substantially diluted by what happened in the eighties. And, as I

have said earlier, I'm not persuaded that the plaintiffs—I'm not persuaded that their suggestion of what fair use was allows them to avoid the dilution of their mark by what happened in the 1980's.

Number six: Is there any actual evidence of confusion. My response to that is no, there is no evidence of that in this record. Now the plaintiffs argue that because the term used here, March Madness, is virtually identical in both situations, that this confusion is presumed. But for the same reasons that I have gone back to three or four times already, the fact that we're talking about completely different animals here, a high school tournament as opposed to a college tournament, I just don't believe that that presumption is reasonable in this case.

The last item, number seven: The intent of the defendant to palm off his product as that of another. There is no evidence of that. We talked about reverse confusion, but again, for the reasons I've already stated, I don't think that's correct.

My law clerk has admonished me that I made the statement that the NCAA had established a common law trademark and that perhaps this is beyond the scope of the issues before you. Thank God for law clerks. But I think in this situation I needed to say that, or at least come close to saying that, because it's necessary to explain why I don't believe in the 1990's or in the late 1980's that the plaintiff was any longer legally able to expand their mark beyond the high school tournament situation.

I think that's everything I have to say. The bottom line is—although I think if you listened to what I was saying, some of these factors really come down in favor of the plaintiff and some of them in favor of the defendant—the bottom line to me clearly is that the plaintiff is not entitled to injunctive relief.

I might also hasten to add that these findings that I have made today are based solely on the record that I have before me and are made only for the purposes of this injunction hearing and

are not intended in any way to suggest what might happen later in this lawsuit. This has not—this is not a situation where the findings on the preliminary injunction have been joined with findings on the underlying merits in the case, so the potential for there to be a change in the rulings by this Court are certainly open.

Let me ask this. Whether anyone agrees or disagrees with the findings that I have made, are three any bases that you feel need to be touched here, one way or the other, that I have not addressed? You might want to take a couple of minutes and confer and tell me what you think on that. I might add, parenthetically, that I do reserve the right to supplement these oral findings with written findings, but at this point I don't anticipate doing that.

MR. YOUNG: Your Honor, I think just one point of clarification is that the issues that we're talking about here are in connection with a CD-ROM product being marketed as NCAA Championship Basketball, just so we're clear that your holding—

THE COURT: My holding is limited to that. In other words, you came in here seeking to bar them from being able to proceed with the marketing of that product on the basis of your trademark, correct? And my ruling is limited simply to saying that in terms of your request for injunctive relief, I don't believe that you have made a showing that there is a reasonable likelihood of success on the merits of that claim and, consequently, I believe that extraordinary relief is inappropriate.

But your question raises—I'm glad you mentioned that. In any situation like this, of course the Court is to look at the traditional factors as to whether or not extraordinary relief is appropriate. One of those factors is whether or not there is an adequate remedy at law. Another is whether or not there is irreparable harm if the injunction does not issue. Both of those issues are somewhat interrelated.

My understanding of this area of the law is that if you have established a likelihood of success, and in this case it's something more than negligible likelihood of success, then there is a presumption that is operative that would say that there is no adequate remedy at law and the harm would be irreparable. The Court is also to look to the harm that would come to the plaintiffs in this case if the injunction does not issue and the harm that would attach to the defendants if it did.

The harm to the plaintiff in this case is the use of the—the ability of the defendant to go forward with the marketing of this CD-ROM, that I'm sure from your point of view would have the effect of further diluting any appropriate interest that you have in the mark. From the defense point of view, the harm would be that they would have to stop what they're doing with this product and not proceed with the creation or manufacture or marketing of it. I think that both of those are very substantial. I think it's frankly kind of a wash in that respect. There is no indication in this record that either party comes to the court with unclean hands.

And in terms of the public interest here, which is also something I am to look at, I think that both sides have a fairly strong argument in that regard. From the plaintiff's point of view, there is a strong public interest in upholding and enforcing trademarks. There are many examples in the marketplace at any time of the unwarranted effect, economic impact, of trademark violations or copyright violations or patent violations, all of the intellectual property issues, for a variety of reasons on the person who is actually entitled to the use of the product.

On the other hand, there is also an interest in seeing that, in terms of the marketplace, that people should be allowed to proceed with the manufacture and sale of products unless there is a compelling reason not to allow them to do that. And a compelling reason in our case would be the existence of an enforceable trademark that should prevent them from doing it. So

I think that the public interest is seriously involved, whichever way the Court would proceed here. Does that cover it?

MR. YOUNG: That does cover it.

THE COURT: Anything else?

MR. KRAAI: No, Your Honor.

THE COURT: Again, I want to thank you very much for the quality of your written materials and for the quality of your oral presentations here this afternoon. Thank you very much.

*** EXCERPT CONCLUDED ***

CERTIFICATE

I, KAREN S. HANNA, certify that the foregoing transcript constitutes a true and accurate transcript of the original shorthand notes of the proceedings had at the time and place aforesaid before the HONORABLE MICHAEL M. MIHM, Chief U.S. District Judge.

/s/ Karen S. Hanna — 3/21/96

Karen S. Hanna, CSR — Date
License #084-001760

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ILLINOIS HIGH SCHOOL ASSOCIATION,
Plaintiff,

v.

GTE VANTAGE INCORPORATED,
Defendant.

Case No. 96-1119

ORDER

Before this Court is Plaintiff's Motion for Expedited Reconsideration, filed April 3, 1996. Defendant filed a Brief in Opposition to Reconsideration on April 11, 1996. For the reasons set forth herein, this Court DENIES the Motion for Expedited Reconsideration.

A motion to reconsider is only available to " 'correct manifest errors of law or fact or to present newly discovered evidence.' " *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D.Ill. 1982)). Motions to reconsider are not to be used to "rehash" the arguments presented during the motion for summary judgment. *In re Oil Spill by "Amoco Cadiz"*, 794 F. Supp. 261, 267 (N.D. Ill. 1992).

In the IHSA's Motion for Expedited Reconsideration, it argues the same facts and several of the same cases previously before this Court during the Motion for Preliminary Injunction. IHSA's Memorandum does not submit any controlling case law which demonstrates that this Court's earlier ruling was a manifest error of law. Additionally, many of the facts set forth in the Memorandum are those which this Court found to be true during

the hearing on the Preliminary Injunction. Nothing in the Memorandum suggests that this Court made a manifest error of law in its findings. Therefore, this Court DENIES the Motion for Expedited Reconsideration.

ENTERED this 15th day of April, 1996.

/s/ Michael M. Mihm

Michael M. Mihm
Chief United States District Judge

APPENDIX E

Trial Testimony, H. David Fry, 3/20/96 AM
Page 21, line 15 to page 25, line 12

Q: Does the IHSA have a presence on the World Wide Web of the Internet?

A: Yes, it does. IHSA has established its own web site and has a substantial amount of March Madness information contained there.

Q: From where can that web site be viewed?

A: Well, it can be viewed from anyone's home computer who has subscription to the service that accesses the web, but it can be accessed directly under the IHSA's web site address. It can also be accessed through a license, a licensed use of the March Madness mark through the Chicago Tribune Online.

Q: Is what we have here as an example? This, Your Honor, is Plaintiff's Exhibit 13. Is this the IHSA home page on the network?

A: This is material from the IHSA home page.

Q: I will also put up Exhibit 17 and ask you if that's the Chicago Tribune's World Wide Web site?

A: Yes, this is from the Tribune Online. It's Online Tribune Sports Section, the March Madness Scrapbook. That particular section contains both historical stories that were written in the Tribune, statistical information, a linkage access to the IHSA home page, interactive video clips from tournament games, etcetera.

Q: Is there a notice of your trademark rights on that?

A: Well, there is—the Chicago Tribune includes on that home page the statement that March Madness is a

trademark of the Illinois High School Association and is used by the Chicago Tribune Company under license.

Q: The Tribune home page, where is that accessible from?

A: That, too, is accessible under the address of the Chicago Tribune Online, but to people all over the world, as I understand it, who have access to online services.

Q: Are there any other uses of the March Madness trademark that you can speak to today?

A: March Madness trademark in terms of uses by the Illinois High School Association?

Q: By or under license from the Illinois High School Association.

A: Uses by the Illinois High School Association, we have published two books entitled "The March Madness Encyclopedia", one focusing on boys' basketball and one focusing on girls' basketball. This is historical records and a substantial amount of detailed data concerning those tournaments back to their inception.

Q: I show you Plaintiff's Exhibit 10 and ask you if that's what you are referring to?

A: Yes, this is the boys' basketball "March Madness Encyclopedia".

Q: Where has that been distributed?

A: That has been distributed to our new media list which includes sources such as ESPN, USA Today, a variety of newspaper, radio and television entitles around the country. It has been distributed within the state. It has been sold both by mail order and on site at our state basketball tournament and I believe information concerning its purchase is accessible through the IHSA web site home page.

Q: Are there other uses of the March Madness trademark?

A: Yes. IHSA has licensed that mark for use by PepsiCo in connection with its soft drinks. It has been used predominantly in relation to Mountain Dew. PepsiCo has also produced a commemorative can that has been distributed this year utilizing the March Madness mark.

Q: I will show you Plaintiff's Exhibit 15. Is that an example of that can?

A: Yes, it is.

Q: I would also like to show you Plaintiff's Exhibit 14 and ask you if that is also a licensed use of the March Madness trademark?

A: These are pictures of the advertising materials, the design and the art work and the inclusion of the March Madness mark that PepsiCo presented to us for our approval in connection with their license to use the mark in a store advertising display with March Madness.

Q: Did they actually use the mark as proposed there?

A: Yes, they did.

Q: When was that?

A: This was used in 1995 in grocery stores and other point of sales displays across the country.

Q: Are there other uses of the March Madness trademark under license?

A: Yes. IHSA, in addition to the Chicago Tribune and PepsiCo licenses, has entered a license with Wilson Sporting Goods for use of the March Madness mark on basketballs to be sold in the retail market. The mark is also licensed to Wilson for use on practice wearing

apparel, shorts and T-shirts and other basketball paraphernalia like coaches' notebooks.

Q: I show you Plaintiff's Exhibit 16 and ask you if that is an example of Wilson's licensed use?

A: Yes. These are photos of three examples of art work which we approved to be used on Wilson produced basketballs, both rubber and synthetic leather balls.

Q: Has Wilson actually produced and sold those basketballs?

A: Yes, they have. They are in retail marketplaces now and we sold some of those balls at our state tournament in our IHSA store at our March Madness Experience.

Q: Have they been sold nationally?

A: To my knowledge they have been.